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BEFORE THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 819

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

INDEX

Subject Index

CASES CITED

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To the Honorable, the Chief Justice and the Associate Justices:

The petition of Central Dispensary and Emergency Hospital respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This is a proceeding upon the petition of the National Labor Relations Board filed in the United States Court of Appeals for the District of Columbia for enforcement of the Board's order issued against the Central dispensary and Emergency Hospital, located in the District of Colum-

bia, directing the hospital to bargain with Building Service Employees' International Union, A. F. of L., as the exclusive bargaining agent of the hospital employees within a designated bargaining unit.

In proceedings before the Board, the hospital made two principal contentions against issuance of the threatened order, namely, (1) that the hospital is not subject to the National Labor Relations Act, and (2) that the Board's certification of the Union as the employees' bargaining agent was improper because it was based upon an election at which less than a majority of eligible voters cast ballots and, therefore, the union had not been designated "by the majority of the employees" as required by the Act.

These two points were renewed by the petitioner in the proceeding brought in the United States Court of Appeals for the District of Columbia together with a third point, namely, that, by reason of changed conditions since the date of the election, the Court should not order the hospital to bargain with the union. In support of this third contention it was shown by affidavit that out of a total of 251 employees who were eligible to vote in the election, only 43 remain at the hospital at the present time and, therefore, the union should not stand certified as the employees' bargaining agency, at least until these present employees are given an opportunity to vote on the matter.

The petitioner contends that it is not subject to the National Labor Relations Act because it is a non-profit charitable institution not engaged in trade, traffic, commerce or transportation within the meaning of the Act.

The Court of Appeals held that the activities of the hospital constituted trade and traffic and "the fact that they are carried on by a charitable hospital is immaterial to a decision of this case." The Court relied upon its decision in *American Medical Association* v. *United States*, 76 U. S. App. D. C. 70, 130 F. (2d) 233, in which it held that the sale of medical and hospital services constitutes trade within the meaning of the Sherman Act.

However, the Court ignored the fact that when this Court reviewed the convictions in the American Medical Association Case, 317 U. S. 519, 528, and one of the questions presented was "whether the practice of medicine and the rendering of medical services as described in the indictment are 'trade' under Sec. 3 of the Sherman Act" this Court did not pass upon the question in affirming the judgment and said "we need not consider or decide this question."

Thus, we still have unanswered by this Court the basic question in the present case: "Does the rendering of medical and hospital services by a charitable hospital and for a fee constitute trade?"

The decision of this point is of real significance. It is agreed that the present is the first instance of a hospital over which the National Labor Relations Board has asserted jurisdiction. However, the decision below is so broad that, if permitted to stand, it would constitute authority for the assertion of jurisdiction over charitable hospitals throughout the country.

In a comment on the decision, the Prentice-Hall Labor Letter of November 24, 1944 said, "Nearly every hospital purchases supplies in other states" and "Although directors of hospitals and other charitable institutions may regard their work as purely local they should remember that U. S. Supreme Court decisions have pushed the line distinguishing national from purely local activities so far that, according to the 7th CCA, "only a mirage lies beyond'."

The second question which we ask this Court to review relates to whether there has been a compliance with the Statute (Sec. 9(a)) providing for designation of bargaining agents "by the majority of the employees" in the appropriate unit. (See appendix for statute.)

In this case, out of 251 eligible voters, only 108 cast ballots and of this number only 75 were for the union.

In sustaining the election, the lower Court relied upon the decision of this Court in *Virginian Railway Company* v. *System Federation No. 40,* 300 U. S. 515, 560. However,

in that case, a majority of the eligible voters participated. This was not so in the present case.

The Court also referred to certain other Federal decisions, but, as pointed out in the accompanying brief, the facts in each of those cases were entirely dissimilar from those here being considered. In every instance, there was evidence of actions by the employer to discourage the employees from voting, thus bringing about the situation of which the employer subsequently claimed the advantage.

The third question for review is whether the hospital should be required to bargain with the union when there now remains in the employ of the hospital only 43 out of the total of 251 employees who were eligible to vote in the election.

B.

Reasons Relied on for the Allowance of the Writ.

A Writ of Certiorari should be granted under subdivision 5(c) of Rule 38 of this Honorable Court for the following reasons:

1. The United States Court of Appeals for the District of Columbia has decided a question of general importance which has not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction or application of a statute of the United States which has not been, but should be, settled by this Court.

3. The United States Court of Appeals for the District of Columbia has not given proper effect to an applicable decision of this Court.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari be issued out of, and under the seal of, this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, to the end that the decision of the United States Court of Appeals for the

District of Columbia, rendered in the case numbered and entitled on its Docket No. 8786, National Labor Relations Board, Petitioner, v. Central Dispensary and Emergency Hospital, Respondent, be reviewed and determined by this Honorable Court; and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JOSEPH C. MCGARRAGHY,
Counsel for Petitioner.

Before The

Supreme Court of the United States

October Term 1944

No. .....

Central Dispensary and Emergency Hospital,
Petitioner,

v.

National Labor Relations Board,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia has not yet been reported. It was delivered on November 13, 1944, and will be found on pages 135 to 139 of the record. The docket number of this case in the United States Court of Appeals for the District of Columbia is 8786.

II.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered November 24, 1944.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. Sec. 347 (a)).

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" of the Petition for Writ of Certiorari filed herewith, and, in the interest of brevity, is not repeated here.

IV.

SPECIFICATION OF ERRORS.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the petitioner's activities constitute trade and traffic and that it is subject to the National Labor Relations Act.

2. In sustaining a certificate based upon an election at which less than a majority cast their ballot.

3. In holding irrelevant evidence which would establish that out of a total of 251 employees who were eligible to vote in the election only 43 remain at the present time.

V.

THE QUESTIONS INVOLVED.

1. Is the petitioner, a non-profit charitable institution, rendering medical and hospital services, engaged in "trade

and traffic" within the meaning of the National Labor Relations Act?

2. Is a certificate of election valid when based upon only the vote of a majority of a minority?

3. Should the petitioner be ordered to bargain with the union when, by reason of changed conditions, it is shown that only 43 employees remain out of the 251 employees who were eligible to vote in the election?

VI.

ARGUMENT.

Petitioner Is Not Subject to the Act.

The hospital is a charitable institution. Approximately 33% of the hospital services are rendered for less than cost and the whole operation of the hospital is without profit.

Hospitals frequently are placed in the same grouping as churches, orphan asylums, industrial schools, and the like. As was said in the case of *St. Louis Union Trust Co.* v. *Oregon Annual Conference*, 14 Fed. Supp. 35, 40, "It is common knowledge that hospitals are considered next after churches as legitimate objects of church ownership."

In the case of *People* v. *Powers*, 147 N. Y. 104, 110, the Court said:

> "We think we may take judicial notice that in the prominent cities of our State there are numerous organized charities that are not incorporated, as well as those that are incorporated. What are they? Hospitals, homes for the friendless, industrial schools, orphan asylums, aged female societies, and children's homes are common names in every city with which we are familiar."

Circuit Judge Parker in the case of *Ettlinger* v. *Trustees of Randolph Macon College*, 31 Fed. (2d) 869, 970, quoted

from Blackstone that "The eleemosynary sort of corporations are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he has directed. Of this are all hospitals for the maintenance of the poor, sick and impotent, and all colleges both in our universities and out of them."

Dealing with the question of whether an institution would be considered charitable even though it makes a charge for services, Judge Parker said:

> "It is clear that a corporation is to be deemed eleemosynary or charitable where its property is derived from charitable gifts or bequests and is administered, *not for the purpose of gain*, but in the interest of humanity; and an educational institution, established and endowed by private charity, falls within the classification. (Dartmouth College Case and others cited). And it is equally clear both that *the eleemosynary or charitable nature* of an educational institution *is not destroyed* by the fact that it makes a charge for tuition, and that the payment of tuition by its students does not prevent their being considered beneficiaries of the charity. * * These principles are settled by the overwhelming weight of authority." (Italics supplied.)

In *New England Sanitarium* v. *Stoneham*, 205 Mass. 335, 342, in which it was shown that 1 7/100ths per cent were free patients, 4 7/100ths per cent were part paying patients, and the balance, or approximately 95% paid the full rate, the Court held that the sanitarium was a charitable institution and on this subject, said:

> "The increase of charitable funds, through receipts from patients or inmates who are able to pay wholly or partially for benefits received, does not change a home for aged people, or hospital, organized and conducted as a charity, into a private association, maintained for the pecuniary advantage of the promoters. The original eleemosynary character of the institution is not transformed by this patronage, even if sufficient to relieve it from financial burdens, but the charity as established remains unaffected."

In *Roosen* v. *Hospital*, 235 Mass. 66, Chief Justice Rugg used the following language:

> "That the defendant is a public charitable corporation established for the care of sick and indigent persons is not controverted. *The fact that it receives compensation from some of its patients does not affect in any respect its character or liability as a public charity.* All such payments are devoted exclusively to charitable uses and not at all for private gain." (Italics supplied.)

Also see *Tucker* v. *Association*, 191 Ala. 572, 598, as follows:

> "It is a well known fact, of which Courts may take judicial notice, that many of the most noted institutions of this country for the treatment of the sick were established by endowments, are not operated for profit, accept charity patients, and are such as come within the definition of charitable institutions laid down in the books."

We next come to our contention that as a charitable institution, the petitioner is not engaged in trade, traffic, commerce, transportation, within the meaning of the National Labor Relations Act.

A definition by Mr. Justice Story in the case of *The Nymph* (C. C.) Sumn. 516-518, Fed. Cas. No. 10388, has been frequently quoted. His language was:

> "Wherever any occupation, employment or business is carried on for the purpose of *profit, or gain, or a livelihood*, not in the liberal arts or the learned professions, it is constantly called trade." (Italics supplied.)

In *U. S.* v. *Keystone Watch Co.*, 218 Fed. 502, the Court held that "trade" was the business of buying and selling *for gain.*

Other Federal decisions to the same effect are *U. S.* v. *Cassidy*, 67 F. 698; *U. S.* v. *Coal Dealers Assn.*, 85 F. 252;

U. S. v. *U. S. Steel Corp.*, 223 F. 255; *National League* v. *Federal Baseball Club*, 259 U. S. 200; *Hood Rubber Co.* v. *U. S. Rubber Co.*, 229 F. 583.

There are a number of state cases, one of them being *Campbell* v. *Union*, 151 Minn. 220, in which the Court said:

> "It seems clear to us that the only logical conclusion is that the word has been used in its broadest sense, and includes business of any kind in which a person *engages for profit.*" (Italics supplied.)

The respondent relies upon the cases of *U. S.* v. *American Medical Association*, 72 App. D. C. 12, 110 F. (2d) 703, certiorari denied 310 U. S. 644, and *American Medical Association* v. *U. S.*, 76 App. D. C. 70; 130 Fed. (2d) 233.

It is to be noted that when the question came to this Court on certiorari, 317 U. S. 519, 528, and one of the questions to be passed upon was whether the practice of medicine and the rendering of medical services as described in the indictment constituted "trade" under Sec. 3 of the Sherman Act, this Court did not pass upon that question in affirming the judgments. Thus, this Court has not yet decided whether or not the practice of medicine constitutes trade under the Sherman Act.

City of Rochester v. *Rochester Girls' Home*, 194 N. Y. S. 236, 237, held that a charitable home for girls was not a "business, trade or industry."

Easterbrook v. *Hebrew Ladies' Orphan Society*, 85 Conn. 289, 298, 82 Atl. 561, 564, held that a charitable home for the aged was not a business within the sense of a restrictive covenant.

Lawrence v. *Nissen*, 173 N. C. 359, 364, 91 S. E. 1036, held that a municipal ordinance declaring hospitals for profit to be nuisances does not discriminate in favor of charitable hospitals as the distinction is reasonable. The Court held that charitable hospitals are not "businesses."

In the case of *Western Pennsylvania Hospital, et al.* v. *Lichliter*, 340 Pa. 382, 387, 17 Atl. (2d) 206, 209, 132 A. L. R.

1136, the question involved was whether the State Labor Relations Act applied to twenty-five non-profit charitable hospitals, which filed a bill in equity to enjoin the Pennsylvania Labor Relations Board from proceeding against them under the Labor Relations Act. The first question presented was whether the Trial Court had jurisdiction to issue an injunction in view of the Pennsylvania Labor Anti-Injunction Act relating to a labor dispute involving persons who were engaged "in a single industry, trade, craft or occupation." The Court held that a hospital is not an industry and giving the words "industry, trade, craft or occupation" their commonly accepted meaning, they do not include the operations of a hospital.

The Court further held that the Legislature did not intend such a result; that the purpose of the Act was to preserve the status quo during labor disputes; that the effect of unionization and attendant efforts to enforce demands would involve results far more sweeping and drastic than merely property rights; that the question of profits for the employer or wages for the employee were not alone involved; that it could not conceive that the Legislature intended to include hospitals within the purview of the Act and that even though the words used might conceivably be broad enough to include a hospital, nevertheless a hospital was not within the spirit of the Act and, not being within the spirit, the Act does not apply to it.

As authority for this proposition, the Court quoted from *Holy Trinity Church* v. *U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, as follows:

> "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the Reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to

include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

The Court pointed out that hospitals are scientific institutions created for humane purposes in amelioration of the sufferings of mankind. They require for their successful operation highly skilled physicians, surgeons, technicians, experts and nurses. They likewise require the services of other persons, some of whom may be skilled and some unskilled, but the whole must be coordinated, controlled and uninterrupted to accomplish the general purpose. This would be impossible should the Labor Relations Act be held applicable with all its attending ramifications, interruptions and possible cessation of service due to labor disputes and attending financial inability to function.

The case of *Jewish Hospital of Brooklyn* v. *Doe, et al.*, 300 N. Y. S. 1111, was a suit to enjoin the union and certain of its officers from interfering with the conduct and operation of the hospital which was a charitable hospital supported mainly by patients of the City of New York and by contributions from other sources. The question involved was whether or not under the statute depriving state courts of jurisdiction to issue injunctions in cases involving or growing out of labor disputes the Trial Court had jurisdiction to issue an injunction. The Court held that even though the anti-injunction statute did not expressly exempt charitable corporations from its operation, the Legislature never intended it to apply to institutions such as the plaintiff hospital. Those involved in the dispute must be engaged in the same "industry, trade, craft or occupation." These words connote and emphasize one common thought, that the parties to the controversy shall be engaged in the same business, enterprise or commercial pursuit, "*one party motivated by the desire for profit,* the other by the desire to

earn a livelihood." The hospital was not thus engaged nor were its sponsors or supporters motivated by any selfish or pecuniary consideration and the Court held that obviously the hospital was not engaged in any industry, trade, craft or occupation for profit within the meaning of the statute.

The Court further held that when the hospital supplied care to so-called free patients it was in fact, if not in name, a governmental agency performing a governmental function which ordinarily belongs to and is usually discharged by the state. And in conclusion, the Court said that its determination that charitable corporations were not meant to be included within the statute finds support in the history of labor struggles for shorter hours, increased wages and better working conditions.

> "The conflict which is almost as old as labor itself, always was between those whose capital *was invested in business for profit* and those whose efforts contributed to the earning of profits. Therefore, it is reasonable to assume in the absence of express language to the contrary that in enacting the statute the Legislature had in mind industrial and commercial enterprises organized for profit and the labor controversies and litigations incident to their operation and not nonprofit charitable institutions such as plaintiff hospital." (Italics supplied.)

In the case of *State Labor Relations Board* v. *McChesney*, 27 N. Y. S. (2d) 866 (New York, 1940), 27 N. Y. S. (2d) 870 (New York, 1941), the New York State Labor Relations Board applied to the Supreme Court to confirm its determination against McChesney who owned and operated a private hospital conducted for profit requiring him to bargain collectively with his hospital service and maintenance employees. The respondent challenged the jurisdiction of the Board largely on the ground that the intent of the New York Legislature was to control labor relations in industry and he contended that his hospital was not engaged in industry. However, the Court held that the Act covered

"labor conditions in any field of employment where the objective is the earning of a livelihood on one side and the gaining of a profit on the other." The respondent called attention to the fact that the Labor Board admitted it had no jurisdiction over employees of a voluntary hospital, arguing that there should be no distinction in this respect as against a private hospital inasmuch as their functions in the care of the sick are identical, but the Court said that "judicial decision has indicated a distinction between the two types of institution" and after referring to the decision in *Jewish Hospital of Brooklyn* v. *John Doe, supra,* the Court said that the argument advanced by the respondent in this respect "could be employed with equal force by a large milk corporation claiming that it performs the same function as a charitable organization devoted to the free distribution of milk" and, therefore, the Court concluded that although *charitable hospitals were exempt from the Act,* private hospitals conducted for profit were not.

The case of *Northwestern Hospital* v. *Public Building Service Employees Union,* 208 Minn. 389, 294 N. W. 215, although relied upon by the respondent does not in fact support its contentions. In that case the Court was required to interpret the Act of the Legislature giving the State Labor Conciliator jurisdiction in the case of a dispute in any "industry, business or institution affected with the public interest." The Court there held that "a hospital such as the plaintiff corporation operates is generally regarded as an institution in the community. *It is not a business or industry* but it is concerned with the well being of the people." (Italics supplied.) From this quotation, it will be seen that the Court based its decision upon the finding that the hospital was an institution. It expressly found that the hospital was not a business or industry.

The Board's Certification Is Improper.

The election report (App. p. 92-93) shows that there were 251 employees on the eligible list; that only 108 ballots were

cast; that only 101 ballots were counted; that only 75 votes were cast for the union. In other words, only 40.2% of eligible votes were counted and only 29.9% of the total number of eligible employees voted for the union.

Section 9-a of the National Labor Relations Act provides that "representatives designated or selected for the purposes of collective bargaining by *the majority of employees* in a unit appropriate for such purposes shall be the exclusive representative of all the employees of such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

It seems to us that the language is clear that the representatives must be selected "by the majority of employees." Certainly a union selected by less than 30% of the employees should not have the right to speak for all.

The Court of Appeals sustained the election on the authority of *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 560. We respectfully urge that, in this respect, the Court did not give proper effect to that decision.

In that case, the trial court expressly held *invalid* an election as to a craft where less than a majority of those eligible to vote actually voted. It sustained the election in other crafts by a majority of voters where a majority of those eligible to vote actually participated. *It did not sustain a certificate based upon the vote of the majority of a minority.* (See *System Federation No. 40* v. *Virginian Railway Co.*, 11 Fed. Supp. 621.)

It was from this ruling that the decision of the trial court was first affirmed by the Circuit Court of Appeals, Fourth Circuit, 84 Fed. (2d) 641, and then by this Court.

It seems to us that it is an authority directly contrary to its application by the Court of Appeals.

The other cases cited by the Court are readily distinguished.

In the case of *New York Handkerchief Manufacturing Co.* v. *National Labor Relations Board*, 114 Fed. (2d) 144, the

principal issues involved related to various alleged unfair labor practices with respect to which the Board was sustained. While it is true that less than a majority of the eligible voters cast their ballots, the Court sustained the election because the Board found "that petitioner was guilty of coercion and intimidation against its employees, which, no doubt, prevented many of them from participating in the election." The Court pointed out that it does not follow that the Board could justify itself in the exercise of such authority in every case regardless of the number who participated in the election and said:

> "In the instant case, as found by the Board, petitioner, by its unlawful conduct, interfered with the right of its employees to participate in the election and, no doubt, was responsible for the small proportion of the employees voting. *Under such circumstances*, we are of the opinion that the Board not only was within its authority, but was justified in concluding that the union was the proper representative." (Italics supplied.)

Even under the circumstances recited above, the Court stated that:

> "The authority of the Board to certify the union under such circumstances presented an important question, not free from doubt."

To the same effect is the case of *National Labor Relations Board* v. *National Mineral Co.*, 134 F. (2d) 424. In that case the company was accused of anti-union activity and refusal to cooperate in the holding of the election. Prior to the election the Board sent twenty-five copies of the election notice to the company to be posted in its plant. The company refused to post them. The company agreed to furnish a copy of the payroll for the guidance of the Board in conducting the election but failed and refused to do so. On election day, supervisory employees gathered near the vot-

ing place and kept the employees under surveillance, all of this with the result that less than a majority of the employees voted. The Court found that the company was "a flagrant violator of the provisions of the Act" and said that its prejudicial conduct was so apparent that it never attempted in its brief or in oral argument to defend its conduct and after summarizing the various acts committed by the company, the Court said:

> "You have a totality of opposition by the company to the efforts of its employees to organize that warranted the Board in finding *that the company's conduct was an interference with the election and was responsible for the small number voting.*" (Italics supplied.)

In the case of *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, again we have a situation where the employer had been guilty of acts of intimidation particularly wage cuts which "necessarily discouraged the employees in maintaining their connection with and representation by the union."

In *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. (2d) 586, the election was sustained on the grounds that *more than a majority* of the eligible voters participated in the election and the Court pointed out that "under the Railway Labor Act it has been authoritatively held that a vote of the majority of the participants determines the choice, *if the election was participated in by a majority of the employees entitled to vote.*"

We submit that none of the cases cited above are authorities on the proposition before this Court. There is no evidence or suggestion that the respondent hospital did anything to interfere with the rights of the employees voting and it is clear that *the election was not even participated in by a majority of the employees eligible to vote.*

By Reason of Changed Conditions This Court Should Not Order the Hospital to Bargain With the Union on the Basis of the Certification of December 26, 1942.

Even if it should be determined that the petitioner is subject to the jurisdiction of the National Labor Relations Board, and, further, that the certification based upon the election was valid, nevertheless we urge that changed conditions since the election are such as to require the Court to refuse to issue the order of enforcement.

In the Court of Appeals, we submitted an affidavit showing that of the 251 employees who were eligible to vote at the election conducted on October 21, 1942, only 43 employees are now in the employ of the hospital. If we assume that all 43 originally voted for the union and would do so now, that number represents only about 17% of the total number of employees. We submit that under such circumstances, the hospital should not be required to bargain with the union.

In *National Labor Relations Board* v. *Fan Steel Metal Corporation*, 306 U. S. 240, 83 L. Ed. 627, the Court held that an order of the National Labor Relations Board requiring an employer to bargain collectively with a certain labor organization as the exclusive representative of the employees in a certain unit is improper where, as a result of the lawful discharge of participants in a sitdown strike, new men had been employed and it does not appear that such organization is still the choice of a majority of the employees as their representative. (See headnote 7.) The Court said:

> "The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require respondent to treat Lodge 66 *in the altered circumstances* as such a representative. If it is contended that Lodge 66 is the choice of the employees,

the Board has abundant authority to settle the question by requiring an election." (Italics supplied.)

It is true that in some instances the Court has held that even though a majority has turned to a minority in the course of time, the Court will enforce the original Board's order. These cases are distinguishable, however, in two respects, first, the union never had a majority in the pending case and, second, in the pending case, there is no suggestion of intimidation, coercion, or other unfriendly attitude upon the part of the employer designed to bring about the changed conditions.

In the case of *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 316, 343, 84 L. Ed. 1226, the Court held that a shift in membership from an affiliate of a national union to a rival company union did not operate to change the representative character of the national union *where the shift was due to unfair labor practices of the employer in persuading and coercing the employees to change over to the company union.*

In *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512, 86 L. Ed. 380, the Circuit Court of Appeals had directed that the Board's order be modified so as to require it to conduct an election to determine whether the certified union had lost its majority due to a shift of employees to a rival independent association. This Court reversed, holding that "the Board had considered the effect of a possible shift in membership, alleged to have occurred subsequent to Lorillard's unfair labor practices but it had reached the conclusion that in order to effectuate the policies of the Act, Lorillard must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of Lorillard's refusal to bargain."

We submit that the Lorillard case is easily distinguishable for there, the Board had considered the effect of a possible shift in membership. In the pending case there has

not been a shift in membership, but even if what has taken place should be treated as a shift, it has not been considered by the Board.

In the case of *Franks Bros. Company* v. *National Labor Relations Board*, 64 S. Ct. 817, Vol. 88 L. Ed. Advance Opinions, page 773, the Court found many instances of unfair labor practices including "an aggressive campaign against the union even to the extent of threatening to close its factory if the union won the election" and, therefore, sustained the order of the Board requiring the company to bargain with the union which represented a majority of the employees prior to the unfair labor practices.

VII.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision of the United States Court of Appeals for the District of Columbia be reversed and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

JOSEPH C. MCGARRAGHY,
Counsel for Petitioner.